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MEMORANDUM

TO: Members of the Utah State Legislature

FROM: Thomas R. Vaughn, Associate General Counsel

DATE: April 20, 2007

SUBJECT: New United States Supreme Court Opinion on Partial-Birth Abortions

This document is a legal synopsis of the opinion issued by the United States Supreme Court on April 18, 2007, in Gonzales v. Carhart, 550 U.S. ____ (2007). It is not intended, and should not be relied upon, as legal advice to any party other than the Legislature of the State of Utah and individual legislators in their capacity as legislators.

Introduction:

On April 18, 2007, the United States Supreme Court issued its decision in Gonzales v. Carhart, 550 U.S. ____ (2007), upholding a federal statute banning partial-birth abortions in the United States. This document provides a synopsis of this significant abortion decision and its impact on Utah's abortion law.

Background for ruling in Gonzales v. Carhart:

Before *Gonzales*, the Supreme Court ruled on a partial-birth abortion ban statute in Stenberg v. Carhart, 530 U.S. 914 (2000). In that case, the Supreme Court struck down a Nebraska statute, because it placed an undue burden on a woman's right to obtain an abortion by prohibiting the use of the D&E (dilation and extraction) abortion procedure, both intact and standard, without providing a health exception.

In 2003, in response to the Court's decision in *Stenberg*, Congress enacted a partial-birth abortion statute that made it a federal crime, punishable by up to two years imprisonment, to perform a certain type of D&E procedure that the court in *Gonzales* refers to as "intact D&E" (usually performed during the second trimester), regardless of whether the fetus is viable to survive outside the mother's womb at the time of the abortion. An intact D&E procedure involves partially delivering an intact fetus prior to killing it, rather than dismembering the fetus in the mother's womb and removing the parts separately. Specifically, the federal statute (18 U.S.C. 1531) prohibits a physician from performing an abortion when the person:

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- (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
- (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; . . . Id.

The statute includes an exception when the abortion is necessary to save the mother's life, but it does not contain an exception for when the procedure is necessary to protect the mother's health.

Gonzales v. Carhart - Ruling of the United States Supreme Court on challenges to the federal partial-birth abortion statute:

The parties challenging the federal statute claimed that the statute is unconstitutional on its face on the grounds that it is vague, overbroad, and places a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability. Gonzales v. Carhart, 550 U.S. ____ (2007). The United States Supreme Court, in a 5 to 4 decision, rejected all of these claims and upheld the statute as constitutional. The following is a discussion of the challenges raised to the federal statute and the Supreme Court's response to those challenges:

Vagueness:

The court held that the federal statute is not unconstitutionally vague and does not encourage arbitrary or discriminatory enforcement, because: first, the statute is clear that it only prohibits the intact D&E abortion procedure; second, the statute clearly specifies "anatomical landmarks," to which a fetus may not be delivered prior to killing the fetus; third, a physician is not guilty of the conduct prohibited by the statute unless the physician performs an overt act, other than delivery of the fetus, that kills the partially delivered living fetus; and fourth, a physician is not guilty of the conduct prohibited by the statute unless the physician "'deliberately and intentionally'" delivers the fetus to one of the anatomical landmarks "'for the purpose of performing an overt act that the [physician] knows will kill [it].'" Id. (quoting 18 U.S.C. 1531).

Overbreadth:

The Court rejected the assertion that the statute is overbroad, because the statute does not prohibit most D&E procedures "in which the fetus is removed in pieces, not intact." Id. Moreover, the court noted that the federal statute was not as broad as the statute reviewed in *Stenberg*, which prohibited the killing of a fetus in all cases where a "substantial portion" of the fetus (such as an arm or a leg) was first delivered into the vagina prior to killing the fetus. The

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court also explained that if the fetus is accidentally delivered to an anatomical landmark prior to killing it, the statute is not violated, because the physician did not "deliberately and intentionally" deliver the fetus to that point.

Substantial obstacle to the right of a woman to obtain a pre-viability abortion:

The court rejected the argument that the federal statute imposes, on its face, a substantial obstacle on the right of a woman to obtain a pre-viability abortion. In doing so, the court recognized that the government "has an interest in protecting the integrity and ethics of the medical profession" by prohibiting what Congress referred to as a "brutal and inhumane procedure." Id. The Court also recognized that "[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman." Id.

The court held that the lack of a health exception in the federal statute does not render it unconstitutional, because the statute does not prohibit the use of a "commonly used and generally accepted" alternative method (e.g. D&Es that do not constitute intact D&Es) and there is "medical uncertainty over whether the Act's prohibition creates significant health risks." Id. The court explained that "[w]hen standard medical options are available, mere convenience does not suffice to displace them" Id.

Conclusion:

The Court upheld the federal statute banning the deliberate and intentional use of the intact D&E abortion procedure (18 U.S.C. 1531(a)). In doing so, the court held that the statute is not unconstitutionally vague, does not encourage arbitrary or discriminatory enforcement, is not overbroad, and does not, on its face, impose a substantial obstacle on the right of a woman to obtain a pre-viability abortion. The court did, however, leave the door open regarding whether there may arise a specific circumstance where the statute "as applied" could result in a successful constitutional challenge.

In reaching its decision, the Court also recognized that the "government may use its voice and its regulatory authority to show its profound respect for life within the woman" and that "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." Id.

Significance of decision:

This is the first time since the decision in Roe v. Wade, 410 U.S. 113 (1973) that the United States Supreme Court has upheld a government attempt to prohibit a specific abortion procedure.

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The decision significantly strengthens the government's ability to use its regulatory authority to promote its "respect for life, including life of the unborn." Gonzales v. Carhart, 550 U.S. _____ (2007).

Utah partial-birth abortion statute:

The Utah statute prohibiting partial-birth abortions is included in Section 76-7-326, and the term "partial birth abortion" is defined in Section 76-7-301. Most of the language in the Utah statute, including the definition, was taken verbatim from the federal statute that was upheld in *Gonzales*. The Utah statute is currently in effect and does not require further legislative action to implement it. Violation of the statute is a felony of the third degree which carries a term of up to five years in prison.

Further information:

If you need further information, please contact Thomas Vaughn, at 538-1032 or tomvaughn@utah.gov.